BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	R.06-10-005 (Filed October 5, 2006)

REPLY COMMENTS OF AT&T CALIFORNIA (U 1001 C) ON THE PROPOSED DECISION OF COMMISSIONER CHONG, MAILED JANUARY 16, 2007

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SUBJECT INDEX

Pacific Bell Telephone Company d/b/a AT&T California ("AT&T California" or "AT&T") provides the following reply comments on the **Proposed Decision of Commissioner Chong**, mailed January 16, 2007 ("Proposed Decision" or "PD").

I. INTRODUCTION

The first and primary finding of the Digital Infrastructure And Video Competition Act of 2006 ("DIVCA" or "the Act") is that "*[i]ncreasing competition* for video and broadband services is a matter of statewide concern,"[1] because *increasing competition* will: (1) provide consumers with more choice, (2) lower prices, (3) speed the deployment of new communication and broadband technologies, (4) create jobs, (5) benefit the California economy, and (6) increase opportunities for programming that appeals to California's diverse population and many cultural communities.[2]

Standing DIVCA on its head, several commentors urge the Commission to attempt to achieve the Act's goals through regulation rather than competition. In the words of one such commentor:

> In general, the PD sets aside video as a different, less regulated entity under Commission jurisdiction. We believe that this is a dangerous precedent.[3]

To the contrary, the PD's treatment of video services as "different" and "less regulated" is not a "dangerous precedent," it is *a requirement of DIVCA*. DIVCA went to great lengths to make clear that "video service providers *are not public utilities* or common carriers,"[4] and that "[t]he holder of a state [video] franchise *shall not be deemed a public utility* as a result of providing video service…."[5] Thus, DIVCA *requires* that video services be less-regulated than public utility services.

DIVCA also repeatedly emphasizes that it provides the Commission with very limited authority over video services and video service providers,

> [DIVCA] shall not be construed as granting authority to the commission to regulate the rates, terms, and conditions of video services, except as explicitly set forth in [DIVCA].[6]

> Neither the commission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise *or otherwise impose any requirement* on any holder of a state franchise *except as expressly provided* in [DIVCA].[7]

DIVCA's main and overriding goal is to bring benefits to California and Californians through competition, not regulation.

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[1] Pub. Util. Code § 5810(a)(1) (emphasis added).
[2] Pub. Util. Code § 5810(a)(1)(B); Pub. Util. Code § 5810(a)(1)(D).
[3] CCTPG/LIF Comments, p. 11.
[4] Pub. Util. Code § 5810(a)(3) (emphasis added).
[5] Pub. Util. Code § 5820(c) (emphasis added).
[6] *Id.*
[7] Pub. Util. Code § 5840(a) (emphasis added).

II. DISCUSSION

A. Issuance Of A Video Franchise Is A Ministerial Act Not Subject To Protest.

DIVCA's focus on competition as the driver of positive change is reflected in the circumscribed and timely application process it requires. DIVCA sets forth very precise application requirements and a very specific application process, and orders the Commission to require no more:

> The application process described in this section [5840] and the authority granted to the commission under this section *shall not exceed the provisions set forth in this section*.[8]

Section 5840 establishes nine specific items to be included in the application,[9] and then mandates that "if the commission finds the application is complete, it *shall* issue a state franchise…."[10] To quickly spur competition, DIVCA further provides that a franchise is deemed awarded if the Commission fails to act within 44 calendar days.[11]

Ignoring DIVCA's clear directive, several commentors seek to import cumbersome public utility procedures and requirements into video service proceedings, including protests.[12] As previously explained, protests are inconsistent with DIVCA. "Where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial."[13] In legislation, "[t]he word 'shall' indicates a mandatory or ministerial duty."[14] Thus, upon submission of a complete application, the Commission is under a ministerial duty to issue a video franchise. Protesting a ministerial decision "would be an idle act and could accomplish nothing."[15] Thus, protest of video franchise applications is not allowed. Further, because application approval is ministerial, it is properly delegated to the Executive Director—despite the claim of one commentor.[16]

Implicitly conceding (again) that no other provision could conceivably involve a non-ministerial act, one commentor[17] focuses on the requirement that the application include "[a]dequate assurance that the applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the applicant."[18] This argument ignores or misconstrues the last sentence of this provision, which specifies

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[8] Pub. Util. Code § 5840(b) (emphasis added).
[9] Pub. Util. Code § 5840(e).
[10] Pub. Util. Code § 5840(h)(2) (emphasis added).
[11] Pub. Util. Code § 5840(h)(4).
[12] TURN Comments, pp. 8-10;.CFC Comments, pp. 10-12; Greenlining Comments, pp. 10-11; *see also* CCTPG/LIF Comments, p. 2 (arguing process not ministerial).
[13] *Rodriguez v. Solis* (1991), 1 Cal.App.4th 495, 504-505 (citing *Great Western Sav. & Loan Assn. v. City of Los Angeles* (1973), 31 Cal.App.3d 403, 413).
[14] *Lazan v. County of Riverside* (2006), 140 Cal.App.4th 453, 460.
[15] *Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County* (1944), 62 Cal.App.2d 378, 383.
[16] CFC Comments, p. 12.
[17] *Id.* at 3-6.
[18] Pub. Util. Code § 5840(e)(9).

that, "[t]o accomplish these requirements, the commission may require a bond."[19] Thus, contrary to this commentor's claim,[20] if an applicant posts the prescribed bond the Commission *must* find this requirement is met.

Some commentors claim a protest could be made, responded to, considered and acted upon by Commission within the 30 days allowed for determining application completeness.[21] This claim is entirely unrealistic. Commission rules for public utilities allow protests of applications to be filed within 30 days from the date an application is noticed in the Daily Calendar,[22] and then allow 10 days for replies.[23] Thus, existing rules establish a 40+ day process—not even allowing time for Commission deliberation or action. But DIVCA requires the Commission to notify an applicant whether its application is complete within 30 days.[24] Obviously, DIVCA does not envision protests.

Commentors argue the Commission's determination that it has some discretion in establishing the application process requires that the actual issuance of a franchise be considered non-ministerial.[25] This argument ignores the distinction between (a) the act of establishing procedural rules and (b) the act of following those procedural rules, once established.[26]

One commentor claims the video application is part of an applicants' business plan that must be regulated by the Commission[27] and reviewed for compliance with non-discrimination requirements at the time of application—with the participation of affected communities and their representatives.[28] This claim directly contradicts the mandate of DIVCA that the Commission must issue a franchise if the application is "complete."[29] No analysis of build-out plans is required, or allowed.

B. <u>Confidential And Proprietary Information Should Be Respected.</u>

AT&T agrees with the comments of Verizon and others that greater proprietary protection is needed.[30] AT&T continues to believe that the Proposed Decision's requirement to report broadband,

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[19] *Id.*
[20] CFC Comments, p. 4. The bond "accomplishes" these requirements, it does not merely supplement them. Merriam-Webster defines "accomplish" as, among other things, "to bring to completion : FULFILL."
[21] CCTPG/LIF Comments, p. 3; CFC Comments, pp. 11-12.
[22] Rule 2.6(a).
[23] Rule 2.6(e).
[24] Pub. Util. Code § 5840(h)(1).
[25] CFC Comments, pp. 8-9; CCTPG/LIF Comments, p. 5 (allowing four months to provide socioeconomic data).
[26] *See*, *e.g., Holland v. Gay*, 2006 WL 2374788 (M.D. Ga.), *slip op.* at *10 (citing *Phillips v. Walls*, 529 S.E.2d 626, 629 (Ga. Ct. App. 2000)).
[27] CCTPG/LIF Comments, pp. 2-3.
[28] *Id.* at 1, 3, 7.
[29] Pub. Util. Code § 5840(h)(2). The proposed affidavit also should be clarified to: (1) recognize that 5890(b) is not a requirement in itself; rather, it is a means of satisfying 5890(a); and (2) not require applicants to waive their right to seek an extension pursuant to 5890(f). The simplest means of making this correction would be to require applicants to certify they will comply with the provisions of section 5890, as applicable.
[30] Small LECs Comments, p. 10, Verizon Comments, pp. 12-13.

video and low-income data as part of the application process is contrary to DIVCA.[31] Nonetheless, if this information is required, it should be accorded the same confidential treatment it would enjoy if it were reported annually pursuant to section 5960.[32] Indeed, the PD requires reporting of the same type of information in the application process as section 5960 requires beginning in April, 2008. Declining to treat this information as confidential in the application process completely undermines the protections of section 5960. Finally, as Verizon properly notes,[33] where there is only one franchise holder in a geographic area, geographically-specific information should not be made public.

C. The Proposed Decision Properly Addresses Section 5940.

Some commentors claim DIVCA generally prohibits "cross-subsidization" and insist the Commission immediately begin collection and examination of "highly detailed and disaggregated data"[34] to this end. The proposed extensive and burdensome monitoring requirements are inconsistent with DIVCA and unnecessary.

As indicated above, the Commission may not "impose any requirement on any holder of a state franchise except as expressly provided in [DIVCA]."[35] The proposed "cross-subsidization" monitoring goes far beyond the specific reporting requirements of DIVCA[36] and thus is contrary to the Act. Further, DIVCA's "cross-subsidization" prohibition is narrowly focused on a specific issue:

> The holder of a state franchise under this division who also provides stand-alone, residential, primary line, basic telephone service *shall not increase this rate* to finance the cost of deploying a network to provide video service.[37]

Thus, this provision is triggered only where there is (a) an increase to specific, basic rates; *and* (b) that increase is used to finance deployment of a video network. As the PD properly notes, the rate freeze imposed by DIVCA[38] makes this impossible prior to January 1, 2009; and the Commission has more than sufficient tools at its disposal to ensure any rate increases after that date are not used to finance the cost of deploying a video network.[39] Accordingly, it would be contrary to DIVCA and unnecessary to impose any further monitoring requirements in this, or any other, phase of this proceeding.

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[31] *See* AT&T Comments, pp. 6-8.
[32] Pub. Util. Code § 5960(d).
[33] Verizon Comments, pp. 12-13.
[34] TURN Comments, p. 4; DRA Comments, pp. 8-12.
[35] Pub. Util. Code § 5840(a).
[36] Pub. Util. Code §§ 5920, 5960.
[37] Pub. Util. Code § 5940 (emphasis added).
[38] Pub. Util. Code § 5950.
[39] Proposed Decision, pp. 175-79.

D. The Proposed Decision's Reporting And Enforcement Provisions Should Not Be Further Expanded.

As indicated in AT&T's opening comments, the Proposed Decision's reporting and enforcement provisions already exceed those allowed under DIVCA.[40] Accordingly, calls to further expand reporting[41] and enforcement provisions[42] should not be heeded. In particular, DRA's request that franchise holders report granular video subscriber numbers[43] would require submission of highly sensitive competitive information that has no relevance to any requirement of the Act.

E. The Proposed Decision Properly Defines DRA's Role.

Contrary to the arguments of some commentors,[44] the Proposed Decision properly defines DRA's role. The PD limits that role to advocacy, rather than bringing complaints, because that is what DIVCA requires.[45] Following DIVCA's mandate that "video service providers *are not public utilities* or common carriers,"[46] the Proposed Decision recognizes that DRA should not have the broad access to proprietary information it enjoys with respect to public utilities, and establishes a reasonable procedure to ensure DRA access is consistent with its limited role. The PD should be clarified to ensure DRA follows this process before gaining access to *any* DIVCA-related filings.[47]

III. CONCLUSION

Accordingly, AT&T California requests the Proposed Decision be clarified and modified as proposed in our opening comments and herein, and approved by the Commission in a timely manner.

DATED: February 13, 2007

Respectfully submitted,

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[40] AT&T Comments, pp. 6-8, 10-12.
[41] *See, e.g.,* Greenlining Comments, pp. 5-9, 14-18; CCTPG/LIF Comments, pp. 6; 8; DRA Comments, pp. 11-12.
[42] *See, e.g.,* DRA Comments, pp. 11-12.
[43] DRA Comments, Attach. 2, pp. 21-22.
[44] DRA Comments, pp. 5-8; CCTPG/LIF Comments, pp. 8-11.
[45] Pub. Util. Code § 5900(k).
[46] Pub. Util. Code § 5810(a)(3) (emphasis added).
[47] The proposed General Order should be corrected to reflect the PD's findings by deleting the references to DRA in Sections VII.C.1 and VII.D.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **REPLY COMMENTS OF AT&T CALIFORNIA (U 1001 C) ON THE PROPOSED DECISION OF COMMISSIONER CHONG, MAILED JANUARY 16, 2007** in **R.06-10-005** by electronic mail and/or by hand-delivery to the person in the official Service List.

Executed this 13th day of February 2007, at San Francisco, California.

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